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ABSTRACT

The absolutist approach to the First Amendment of the United States Constitution--argued for many years by Supreme Court Justices Hugo L. Black and William O. Douglas--is regarded as the most libertarian interpretation by most mass communication law students. However, the two justices found agreement difficult in some First Amendment cases, especially in the last years that Black served on the Supreme Court. This was because Black's literal approach would not allow him to afford "speech plus" First Amendment protection, while Douglas believed picketing and other "symbolic speech" acts could be protected by the First Amendment. Black also disagreed with Douglas's opinion that certain rights were protected as penumbras of the First Amendment. Yet the two justices were virtually in complete agreement on issues dealing specifically with freedom of the press; from 1946 to 1974, when they both were justices, they had a higher index of agreement on the 72 press cases than on either the 1,010 civil liberties cases or all 1,709 nonunanimous cases that came before the Supreme Court. What can be concluded from analyses of the justices' decisions and opinions is that almost all disagreement between them can be explained in terms of their respective attitudes toward the role of the Supreme Court in the political system of the United States. (Author/RI)

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MEASURING ABSOLUTISTS: JUSTICES HUGO L. BLACK AND WILLIAM O. DOUGLAS AND THEIR DIFFERENCES OF OPINION ON FREEDOM OF THE PRESS

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ABSTRACT

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The absolutist approach to the First Amendment--argued for many years by Supreme Court Justices Hugo L. Black and William O. Douglas--is regarded as the most libertarian interpretation by most mass communication law students. However, the two justices found agreement difficult in some First Amendment cases, especially in the last years Black served on the Court.

Black's literal approach would not allow him to afford "speech-plus" First Amendment protection. Douglas, in contrast, believed picketing and symbolic speech could be protected by the First Amendment. Black also disagreed with Douglas's opinion that certain rights were protected as penumbras of the First Amendment.

The two justices virtually were in complete agreement in issues dealing specifically with freedom of the press. Minor differences are reconcilable.

The author of this paper suggests that almost all disagreement between Black and Douglas can be explained in terms of their respective attitudes toward the role of the Supreme Court in the American political system.

MEASURING ABSOLUTISTS: JUSTICES HUGO L. BLACK AND WILLIAM O. DOUGLAS AND THEIR DIFFERENCES OF OPINION ON FREEDOM OF THE PRESS

Mass communication law researchers frequently cite the "absolutist" approach to First Amendment interpretation as the most libertarian. This doctrine was popularly argued by Professor Alexander Meiklejohn in his theory of "political speech."[1] However, the absolutist approach most often is associated with Associate Justices Hugo L. Black and William O. Douglas of the Supreme Court of the United States. They formed the "phalanx of the absolutist movement for many years," according to Professor William E. Francois.[2]

This paper will discuss the absolutist interpretation of the First Amendment in terms of its application to freedom of the press. Justices Black and Douglas's attitudes toward freedom of the press will be compared in an effort to discover what "absolutism" means.[3]

Professor Marc A. Franklin said Black and Douglas were "spurred" toward the absolutist approach by their belief that the clear and present danger test was misinterpreted by the Court's majority in Dennis v. United States.[4] Professor Don R. Pember said Douglas and Black were "frequently" in agreement in freedom of expression cases, but they never were able to induce other justices to join in their absolutist theory.[5]

The author, a Ph.D. student at Southern Illinois University, Carbondale, would like to thank Dr. Robert Trager for his comments.

They wrote joint or separate concurring and dissenting opinions in many First Amendment cases,[6] stressing their rigid belief that the First Amendment meant precisely what it said.[7] They also attacked other "tests" of the First Amendment in some truculent opinions.[8] They occasionally wrote majority opinions that were not as strongly in support of the absolutist view.[9] Black and Douglas's last team effort was in the Pentagon Papers Cases,[10] in which Black, joined by Douglas, said:

> Both the history and language of the First Amendment support the view that the press must be left free to publish news, whatever the source, without censorship, injunctions, or prior restraints.[11]

Douglas, joined by Black, wrote that

> the First Amendment provides that "Congress shall make no law. . .abridging the freedom of speech or of the press." That leaves, in my view, no room for governmental restraint on the press.[12]

The Pentagon Papers Cases were Black's last cases. He retired, then died three months later. Douglas continued to argue the absolutist view until his retirement in 1975.[13] None of the justices on the present Court subscribe to the absolutist interpretation of the First Amendment.[14]

The absolutist view was both attacked and praised for its simplicity.[15] There were some complications in the theory. "All speech under all circumstances" was not protected by the absolutist view, noted Professor Franklin.[16] Black and Douglas reverted to the "balancing" test in

certain types of cases, Professor Thomas I. Emerson observed.[17] Emerson agreed with the absolutist approach to freedom of speech but distinguished speech from action and "symbolic" speech.[18]

This sort of absolute literalism of the First Amendment seemed to part Douglas and Black in some cases.[19] In a case in which Douglas joined the Court's majority in upholding as protected expression students' rights to wear armbands in school, Black dissented.

He stated:

> I have never believed that any person has a right to give speeches or engage in demonstrations where he pleases and when he pleases. This Court has always rejected such a notion.[20]

Black's literal approach forbade him from granting First Amendment sanction to "speech-plus," i.e., expression that extends beyond "pure speech." He would not uphold segregation protest demonstrations in the 1960s.[21]

Douglas, upset with Black's majority opinion, which proscribed a Florida demonstration, called the decision "tragic." He said a

> trespass law is used to bludgeon those who peacefully exercise a First Amendment right to protest the government against one of the most grievous of all modern oppressions which some of our States are inflicting on our citizens.[22]

Black's literal approach did not prevent him from expanding the meaning of "Congress" in the First Amendment to include all government, but it did prohibit him from

expanding its meaning to include private parties.[23] Douglas disagreed with this interpretation.[24] Additionally, Black could not agree with Douglas's thesis that certain "penumbras," e.g., right of privacy, emanate from the First Amendment.[25]

However, Douglas and Black seemed united in their opinions regarding the absoluteness of the free press clause of the First Amendment.[26] Rarely have press freedom cases involved circumstances where the "speech-action" dichotomy, site of expression, penumbras, or "symbolic" speech would be called into play.[27]

Since Black and Douglas's stand on issues involving freedom of the press is regarded as the epitome of libertarianism by mass communication law students, the justices' interagreement in such cases would seem to be an appropriate subject of study. Their voting has not previously been systematically studied in relation to the free press clause.[28] Based on an abundance of literature on the subject we can hypothesize that while Black and Douglas gradually tended to disagree in other matters, their agreement on free press matters remained relatively constant.[29]

Methodology

Complete voting data on the Supreme Court from 1946 to 1974 are available from the American Political Science Association.[30] This data package represents an important

period in the Black-Douglas development of the absolutist theory.[31]

The cases begin with the Vinson Court, just before the stream of loyalty cases in which the absolutist position was pronounced,[32] and extend past Black's retirement from the bench.

The package includes all nonunanimous decisions of the Court during this period. Interagreement between Black and Douglas was studied by construction of fourfold tables relating liberal and conservative voting in all cases and civil liberties cases and favorable and unfavorable voting in press cases. The case selection and case outcomes of the total and civil liberties samples were determined by the Association.[33]

A sample of 72 press cases was assembled for the present study. There were five criteria for a press case: 1) the case had to be nonunanimous; 2) the case had to fall between the dates of the APSA package; 3) the case had to have voting participation by Black and Douglas; 4) the case had to involve, at least minimally, the printed press, or aspects of other media that would be interchangeable with the printed press; and 5) the case had to prompt either or both litigants or any or all justices to invoke the freedom of the press clause as a major argument.[34]

A decision as to whether affirmance or reversal constituted a favorable or unfavorable outcome was based on

two considerations: 1) which litigant claimed that the freedom of the press clause was violated, and 2) which litigant represented the media.[35]

G indexes of agreement were calculated for each of the four-cell tables. The formula for a G index of agreement, which measures the degree of interagreement, is:

$$G_{J_1J2} = \frac{a + d - b + c}{n}$$[36]

where G_{J_1J2} is the G index of agreement for justices J_1 and J_2, a is the conservative/conservative (unfavorable/unfavorable) cell total, b is the liberal/conservative (favorable/unfavorable) cell total, c is the conservative/liberal (unfavorable/favorable) cell total, d is the liberal/liberal (favorable/favorable) cell total, and n is the number of cases in the fourfold table. G indexes exceeding ±.200 arbitrarily were designated representative of statistically significant relationships. Percentages of agreement with the liberal and favorable outcomes of the three samples were also calculated.

There are some problems associated with studying agreement between justices over a long period of time. For example, issues may be presented within different contexts as time passes; new precedents must be followed; justices may change their minds over time; and the makeup of the Court changes as new appointments are made, altering voting "blocs."[37] It is much more interesting and informative to break up the total period into logical time segments.

Time segments representing fairly stable court membership and case loads include periods under Chief Justices Vinson (451 cases between 1946 and 1953), Warren (1,306 cases between 1954 and 1968), and Burger (275 cases between 1969 and 1974). The long period of the Warren Court can be studied in three segments: the "Early Warren" Court (329 cases from 1954 to 1959), the "Middle Warren" Court (564 cases from 1959 to 1965), and the "Late Warren" Court (413 cases from 1966 to 1968).[30] Fourfold tables, G indexes of agreement and liberal and favorable percentages were calculated for each of the five "courts."

Analysis

From 1946 to 1974 Black and Douglas participated in 1,709 nonunanimous cases, agreeing 1,248 times and disagreeing 461 times. Black voted liberally 1,333 times and conservatively 376 times. Douglas voted liberally 1,510 times and conservatively 199 times. Their G index of agreement was .460.

[Insert Table 1A.]

After limiting the sample to civil liberties cases the G index of agreement remained comparatively steady at .420.

[Insert Table 1B.]

However, their G index of agreement in press cases was .833.

[Insert Table 1C.]

Black and Douglas agreed more often in freedom of the press cases than in civil liberties and other cases generally.

Table 2 reveals a trend of strong agreement to weak agreement between Black and Douglas. Their ideologies apparently were similar regarding most issues during their service under Vinson. That similarity was strengthened after Warren became chief justice. As more liberals were added to the Court, however, Black and Douglas found agreement difficult. By 1969, an accurate prediction of one's vote based on the other's vote was impossible.

Despite declining degrees of interagreement in civil liberties and other cases, Black and Douglas continued to show significant agreement in press cases. See Table 3.

Also revealing are Douglas and Black's comparative percentages of liberal voting in all cases and in civil liberties cases and percentages of favorable voting in press freedom cases. The justices also were ranked among their fellow justices on the bases of these percentages.[39] See Table 4.

The rankings and percentages of support for liberalism and press favorableness suggest that although Black's degree of support of liberal causes in all cases and civil liberties cases declined during the period under study, his support of press freedom remained fairly constant and high.

Douglas's support in all three samples remained very high. Douglas and Black finished first and second, respectively, in the total scale of press freedom favorableness.

Although the data do not inherently provide reasons for the degrees of interagreement, they do suggest certain speculation.

Cases of Disagreement

Examination of the six press freedom cases in which Black and Douglas disagreed revealed--at the same time--more about methodological problems of traditional case analysis and weaknesses in the sample selection of the present study than about differences in attitudes between Douglas and Black.

First, a legal researcher seeking to discover why particular justices disagreed on particular issues has to be aware of the hazards of Supreme Court procedural habits. Justices may disagree in a decision on entirely different grounds--never answering the arguments of each other. Indeed, they may agree with each others' agruments but find some other issues in the case more important factors in their voting decisions. They may simply, without comment, concur in or dissent from the majority decision or opinion. Analysis of the press cases systematically sorted for this study suffered from these sorts of problems. In short, differences of opinions among justices--at least in the present study--are better explained by the patterns of voting

interagreement than by traditional analysis of those cases in which the justices disagreed.

Second, although a conscientious effort was made to limit the sample only to those cases in which justices were concerned with the freedom of the press clause, the cases of disagreement dealt with the more peripheral aspects of the problem of freedom of the press. Some of these cases may have grappled less with the essence of freedom of the press than dicta or some aspects of issues in First Amendment non-press cases. Arguably, Black and Douglas as absolutists were most likely to disagree over the periphery of press freedom issues.

The six cases of disagreement between Black and Douglas are Donaldson v. Read Magazine, Barr v. Matteo, Estes v. Texas, Sheppard v. Maxwell, Perez v. Ledesma, and Dyson v. Stein.[40] In none of these cases was freedom of the press the primary issue. In Sheppard and Estes, the question posed to the Court was whether Billy Sol Estes and Dr. Sam Sheppard's trials were fair. Although in both cases the Court blamed the media for causing unfair trials, the Court did not rule that freedom of the press must be infringed so that fair trials could be had.

In Donaldson, the Court merely ruled that Postmaster Donaldson properly interpreted and enforced a federal statute prohibiting fraudulent material to pass through the mail. The Court, in its view, was not dealing with freedom of the press.

In Perez and Dyson, the Court addressed the problem of "comity," i.e., the policy preventing federal interference in pending state criminal proceedings. In neither case did the Court intimate freedom of the press had or had not been abridged.

In Barr, a case that perhaps should not have been in the sample, the Court ruled that a federal official enjoyed immunity from a libel suit instigated by employees he had fired. No "press" litigant was involved.

In every case, however, freedom of the press was a major issue propounded by litigants and justices. In each case Black and Douglas differed, sometimes obscurely and sometimes forthrightly. How could the absolute literal interpretation of the First Amendment create divergent opinions?

The first case, Donaldson, was decided before Black and Douglas had had an opportunity to hone their absolutist stand. Postmaster Donaldson issued a fraud order to Read Magazine under a federal statute preventing dissemination of false or fraudulent advertising through the mail. The magazine advertised a contest to promote circulation, but the scheme was deemed a fraud by Donaldson.

In a 7-2 decision, Black, writing for the majority, held that Donaldson properly read and executed the statute. At the tail-end of the opinion he said the order "only"

> keeps respondents from getting the money of others by false pretenses and deprives them of a right to speak or print only to the

> extent necessary to protect others from their fraudulent artifices. . . . A contention cannot be seriously considered which assumes that freedom of the press includes a right to raise money to promote circulation by deception of the public.[14]

Douglas evidently thought freedom of the press was an issue. Although he did not write an opinion, he joined Justice Burton's dissenting opinion, which called the postmaster's action censorship. Burton wrote:

> I believe that the Postmaster General exceeded his authority when he applied his drastic censorship and fraud order to this particular program.[42]

Eleven years later, in Barr, Douglas and Black again disagreed in a case raising the issue of freedom of the press. Called elsewhere in a similar study[43] an "excellent example" of a case where the Court was required to choose between competing claims for civil liberties, Barr involved the free expression rights of the acting director of the Office of Rent Stabilization and employees he had fired.

Black, as senior justice among the majority, assigned the opinion to Justice Harlan, who was not overly concerned with freedom of expression. He simply sustained Barr's "absolute privilege" and immunity from suit.[44] Black, in a concurring opinion, downplayed the free press aspect of the case, but answered dissents that emphasized the issue. He stressed the importance of "informed public opinion" and the "widest possible understanding of the quality of government service rendered" by officials.[45] Black defended

Barr's right to disseminate information about the government.

Douglas dissented but did not write an opinion. He joined Chief Justice Warren's opinion which argued for Matteo's right to criticize government and its officials "without being subjected to unfair--and absolutely privileged--retorts.[46] Warren said:

> If it is important to permit government officials to say anything they wish in the name of public information, it is at least as important to preserve and foster public discussion concerning our Government and its operation.[47]

Warren said the Court's majority would deter desirable public discussion, "sanctify the powerful and silence debate."[48]

The Estes case involved the highly publicized trial of the confidant of President Johnson. The Court, through Justice Clark, held that Estes did not receive a fair trial and remanded the case for retrial. Clark ruled that freedom of the press was subject to fairness in the judicial process and that the public's right to be informed about court proceedings was satisfied by its and the press's right to attend the proceedings.[49]

Douglas concurred with the majority, joining Warren's opinion, which insisted that the decision was not "inconsistent with the constitutional guarantees of a public trial and the freedoms of speech and the press."[50] Warren wrote:

> So long as the television industry, like the other communications media, is free to send representatives to trials and to report on those trials to its viewers, there is no abridgement of the freedom of the press.[51]

Four justices, including Black, dissented. Black joined Justice Stewart's dissenting opinion, which suggested the majority was not "wary" enough of free press implications.[52] Stewart said parts of the majority opinions

> strike me as disturbingly alien to the First and Fourteenth Amendments' guarantees against federal and state interference with the free communication of information and ideas. The suggestion that there are limits upon the public's right to know what goes on in the Courts causes me deep concern. The idea of imposing upon any medium of communications the burden of justifying its presence is contrary to where I had always thought the presumption must lie in the area of First Amendment freedoms.[53]

The next year the Court, with Justice Black the lone dissenter, reversed the conviction of Dr. Sam Sheppard. Clark, again writing for the majority (including Douglas), said that although the press should be given as much freedom as possible, the press cannot upset the fair administration of justice.[54]

Black wrote no opinion,[55] and it may not be fair to conjecture he dissented on grounds that the ruling would have a "chilling effect" on freedom of the press. However, in view of his feelings that "our system of law has always endeavored to prevent even the probability of unfairness"[56] and his dissent in Estes, it is an educated assumption.

Like Barr, Estes and Sheppard required of the justices a choice between competing claims that civil liberties and rights were being violated. Black, for his part, never wished to choose between the First Amendment right to freedom of the press and the Sixth Amendment right to a fair trial.[57] Douglas wrote a similar opinion on the subject.[58]

The last two cases of disagreement between Black and Douglas were obscenity cases-turned-federalism cases.[59] Perez and Dyson were among a series of cases the Burger Court decided during the 1970 term, the mother case being Younger v. Harris,[60] which reversed a Warren Court policy of halting state proceedings that threatened First Amendment rights. Black, joined by the Court's conservatives, held that despite claims that First Amendment rights were being violated, federal interference in pending state criminal proceedings upset the federalism doctrine of comity.[61] Black said that unless irreparable damage to a person's constitutional rights were at stake federal courts should not interfere with state criminal justice.[62]

Perez had sought a three-judge district court declaratory judgment that Louisiana's laws making displays of obscene materials illegal were unconstitutional. He also sought an injunction preventing his prosecution. Black, for the majority, cited Younger and reversed the federal court's order that seized materials be returned to Perez.[63] In Dyson, the Court issued a per curiam decision again

citing Younger and supporting a continuing state prosecution of a pornography newspaper publisher.[64]

Douglas was incensed. In Younger, Douglas claimed federal interference was justified because the California syndicalism statute was "unconstitutional on its face."[65] In Dyson, he said police seizures of allegedly obscene materials were "search-and-destroy missions in the Vietnamese sense of the phrase."[66] He said that if the raids could be upheld in Dyson, similar raids on the New York Times or the Washington Post could also be upheld.[67] He argued the state action amounted to prior restraint:[68]

> Government certainly has no power to close down newspapers. Every censorship--whether for obscenity, for irresponsible reporting or editorials, or otherwise--is taboo.[69]

He said the Constitution prevented censorship no matter how "vicious, irresponsible, and depraved" the press often may be.[70] Liberally citing his and Black's previous opinions, Douglas wrote:

> It is difficult--indeed impossible--to read the constitutional mandate that government "shall make no law" abridging freedom of the press to mean that government "may make some laws" abridging that freedom. Certainly a strict constructionalist cannot so read it.[71]

Douglas reinterated his well-known stand that obscenity could not be exempted from the meaning of "press."[72] He said:

> Under the Constitution as written there are no standards of "good" or "bad" for the press. Since there is no constitutional definition

> of obscenity, the definition must be largely, if not exclusively, for legislative determination. Absent a controlling constitutional standard, I would think that a legislature could treat literature as it treats sewage effluent or infectious disease. This is not a happy prospect, for some would put even the Song of Solomon under the ban. It is, I fear, the end once we loose our First Amendment moorings.[73]

Douglas seemed to be shaking his finger at Black. Yet the same term, Douglas joined Black in concurring opinions expressing their absolutist views in libel cases.[74]

Thus in three cases Black voted favorably for the press while Douglas voted unfavorably. In Barr, Estes and Sheppard, Black chose freedom of the press over competing civil liberties claims. In three other cases--Donaldson, Perez, and Dyson--Douglas voted favorably for the press whereas Black voted unfavorably. None of these cases involved competing civil liberties claims.

Considering the vast array of cases and issues Black and Douglas addressed through the years, it probably is unfair to draw any conclusions from the isolation of these six cases. For the most part, the differences are obscure, reconcilable, or otherwise explainable. They are symptoms, however, of a potentially more basic difference between Black and Douglas than a difference in attitudes toward freedom of the press: their concepts of the role of the Court in the political system.

Discussion

Black (1886-1971) was appointed by President Franklin D. Roosevelt in 1937. He served 35 years. Douglas, 81, was appointed by Roosevelt in 1939. He served 37 years. They were among the longest serving justices in Supreme Court history.

They were of divergent backgrounds. Black, a former Alabama senator, was a reserved Southern gentleman. Douglas, a former Yale law professor and member of the Securities and Exchange Commission, was fiercely independent and an outdoorsman.[75] The two New Deal Populists, however, were very close in political philosophy. They shared a "unique bond" and a "special kinship" with each other.[76] Douglas reserved praise for Black lest it be seen as praise for himself. In 1956, he wrote that when

> one has been in such frequent agreement with a Brother as I have with Justice Black, it is impossible to write about him without seeming to write about oneself.[77]

In their first 10 to 15 years on the bench, Black and Douglas's voting records nearly were identical. A study of the Roosevelt Court from 1937 to 1947 found Black and Douglas consistently in the same voting bloc.[78] Professor Glendon Schubert likewise concluded about their performance during the 1949-1952 terms that

> there is no adequate basis for distinguishing between the attitude of Douglas and that of Black during these four terms, and that both should be considered extreme liberals.[79]

Some differences emerged in the mid-1950's however. Schubert found Douglas "slightly but consistently" more liberal than Black.[80] That trend continued into 1962. Whereas Black previously had been slightly more liberal in some economic cases, Douglas became more liberal after 1956.[81] Black and Douglas displayed extreme disagreement from 1956 to 1961 in cases dealing with government taxing authority. Black seemed to assess these issues as clashes between social welfare and business causes while Douglas opposed taxation on the basis of his brand of political liberalism, i.e., he demonstrated his "general hostility to government regulation and control over individuals."[82]

In another study, Black and Douglas were confirmed as virtually one "ideational identity," although Black was found to be slightly more states rightist, pro-business and less of a judicial power activist than Douglas.[83]

During this early period, Black and Douglas's opinion-writing habits were also similar. Their interagreement in terms of majority, concurring and dissenting opinion-writing was high in both split and unanimous decisions.[84]

Up until 1963, Black and Douglas's voting in matters of political rights was indistinguishable. Schubert said that the last day of the 1963 term probably marked the beginning of the Black-Douglas estrangement. Black began a "drastic backslide" over the issue of integration sit-ins by blacks.[85]

By the mid-1960s, Black's "conservatism extended to all aspects of political freedom except traditional free speech." By 1969, Black had "backslid" to economic conservatism too.[86] Black became one of the leading conservatives on the Burger Court in regard to many of the "burning issues of the decade--black and peace power, and the liberation of youth and women."[87] In his final terms on the Court Black agreed with conservative Chief Justice Burger more often than with Douglas.[88] He was a "classic conservative" during this period.[89]

While in 1956 Douglas could praise Black for his "consistency in construing" the Constitution to protect civil rights and liberties,[90] in 1970 he was aghast that his "strict construction" colleague could allow an oppressive state statute to stand.[91]

Many reasons have been offered for Black's voting disagreement with Douglas and the rest of the liberal majority of the Warren Court. There are three basic schools of thought: 1) that Black became senile, 2) that Black changed his mind about liberalism and became a conservative, and 3) that Black remained true to his "constitutional faith"[92] as Douglas and the Warren Court majority became too liberal.

Schubert attributed Black's gradual movement away from Douglas to "cultural dissonance . . . because of inexorable physiological changes that accompanied relatively

advanced old age."[93] Professor S. Sidney Ulmer suggested that Justice Black negatively reacted to the unrestrained times, to the "environment" of disorder--particularly the civil rights demonstrations.[94]

Several studies,[95] including those by Harry Kalven, Jr. and Wallace Mendelson, concluded Black changed his mind about the efficacy of the liberal philosophy and became a conservative. Kalven said Black's "fate" was to be confronted with a kind of speech he could not feel the First Amendment protected.[96] Mendelson, who once said Black saw the law as an "instrument in the service of his ideals,"[97] speculated Black "wavered" from his absolutism possibly because of the departure of Frankfurter, a "crisis" in relations with Douglas, or the "advent of the 'new' extreme activism" of Justice Goldberg.[98]

Black, of course, insisted he had been consistent throughout his career. If the First Amendment meant nothing less than it said, it also meant nothing more than it said. He wrote:

> I am vigorously opposed to efforts to extend the First Amendment's freedom of speech beyond speech, freedom of press beyond press, and freedom of religion beyond religious beliefs. Thus, the provisions of the Amendment that make speech, press, and religion free from governmental interference do not immunize other conduct in addition to these particularized freedoms.[99]

Justice Harlan, the lone doctrinaire conservative during most of the Warren Court era, praised Black for his

"steadfast adherence to the traditional concept of the federal judicial role." Black rejected the "open-ended notion that the Court sits to do good in every circumstance where good is needed."[100] Harlan said:

> Those who have purported to discern in some of Mr. Justice Black's recent opinions a shift from "liberalism" to "conservatism" have, it seems to me, missed the true essence of his judicial philosophy.[101]

Others similarly insisted Black remained true to his philosophy.[102]

Those who argue Black's parting of company with his "liberal conferees" happened "unexpectedly but not inconsistently"[103] perforce argue that Douglas and the rest of the Court changed their philosophy. Black felt the Warren majority was "gullible" and went "too far" with policy-making.[104] Douglas agreed with Black on the utility of the absolute approach to the First Amendment until a more liberal approach became available. Douglas believed that the First Amendment did mean more than it said.[105] Mendelson said Douglas's "appetite" was great. "The range of the social problems" that Douglas "would solve" seemed unlimited--"from the most trivial to the most desperate."[106] Although often associated with strict constructionism in the area of the First Amendment, Douglas was unquestionably a judicial activist in virtually every area of law.[107]

Conclusions

Justice Frankfurter's "balancing of interests" test[108] is considered the antithesis of Black's "absolutism" test.[109] The former would allow limits on free expression if the countervailing interest is great enough while the latter would allow no limitations on free expression. However, some constitutional scholars discussed the various approaches to the First Amendment in terms of the justices' conceptions of the proper role of the Supreme Court in the political system.[110] Professor Shapiro wrote that

> the whole debate over the jurisprudential acceptability of balancing of interests versus absolute rights is little more than a facade behind which role of the Court problems lurk. . . . [It] is simply the debate between judicial activism, disguised in language that does little more than make the points at issue somewhat more obscure than they initially were.[111]

Implicit in Frankfurter's test was that the Court was a non-policy-making body which was non-innovative. Most decisions should be left to the political legislative processes, Frankfurter argued. Black's absolutism test implied that the Court had an active role in protecting civil rights and liberties. His test was a "constitutional rule of law" to which he would strictly adhere.[112]

While Frankfurter was willing to let freedom "go by the boards" because of his concept of the role of the Supreme Court,[113] Black and Douglas would not. Black

designed an approach--absolutism--that seemed to make it so that they could not.[114] To Frankfurter, absolutism was unrestrained license to legislate policy; to Black, it was the be-all and end-all of all libertarianism. To Douglas, however, it was merely a temporary instrument to use--a step in the right direction. As the story turned out, the distance in philosophy between Frankfurter and Black was about the same as the distance between Black and Douglas.

The differences of opinion between Black and Douglas in freedom of the press cases were slight and unenunciated. However, their differences of opinion more generally were great and clear. The absolutist approach to the First Amendment was the ultimate libertarian approach, providing neither too much nor too little for full and unequivocal protection for freedom of the press.

Freedom of the press was never a matter of liberalism versus conservatism, activism versus restraint or strict construction versus loose construction for Black and Douglas. Despite their differences in First Amendment interpretation generally, their interpretation of freedom of the press was endurable, immutable and absolute.

TABLE OF CASES

FREE PRESS-FAIR TRIAL

Craig v. Harney, 331 U.S. 364 (1947)
Stroble v. California, 343 U.S. 181 (1952)
Beck v. Washington, 369 U.S. 541 (1962)
Wood v. Georgia, 370 U.S. 375 (1962)
Rideau v. Louisiana, 373 U.S. 723 (1963)
Estes v. Texas, 381 U.S. 532 (1965)
Sheppard v. Maxwell, 384 U.S. (1966)

FREE PRESS-PRIVACY/REPUTATION

Barr v. Matteo, 360 U.S. 564 (1959)
Linn v. United Plant Guard Workers 383 U.S. 53 (1966)
Roseblatt v. Baer, 383 U.S. 53 (1966)
Time v. Hill, 385 U.S. 374 (1967)
Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967)
St. Amant v. Thompson, 390 U.S. 727 (1968)
Rosebloom v. Metromedia, 403 U.S. 29 (1971)

FREE PRESS-COMMUNITY ORDER/NATIONAL INTEREST

Donaldson v. Read Magazine, 333 U.S. 178 (1948)
Breard v. Alexandria, 341 U.S. 622 (1951)
Beauharnais v. Illinois, 343 U.S. 250 (1952)
United States v. Times-Picayune Publishing Co., 345 U.S. 594 (1953)
United States v. Harriss, 347 U.S. 612 (1954)
United States v. IUUAAAIWA, 352 U.S. 567 (1957)
Talley v. California, 362 U.S. 60 (1960)
Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971)

FREE PRESS-NATIONAL SECURITY

Dennis v. United States, 341 U.S. 494 (1951)
Yates v. United States, 354 U.S. 298 (1957)
Schneiderman v. United States, 354 U.S. 298 (1957)
Richmond v. United States, 354 U.S. 298 (1957)
Barenblatt v. United States, 360 U.S. 109 (1959)
Communist Party v. Subversive Activities Control Board, 367 U.S. 1 (1961)
Aptheker v. Secretary of State, 378 U.S. 500 (1964)
Zemel v. Rusk, 381 U.S. 1 (1965)
New York Times Co. v. United States, 403 U.S. 713 (1971)
United States v. Washington Post, 403 U.S. 713 (1971)

FREE PRESS-COMMUNITY MORALITY

Winters v. New York, 333 U.S. 507 (1948)
Doubleday & Co. v. New York, 335 U.S. 848 (1948)
Kingsley Books v. Brown, 354 U.S. 436 (1957)
Roth v. United States, 354 U.S. 476 (1957)
Alberts v. California, 354 U.S. 476 (1957)
Smith v. California, 361 U.S. 147 (1959)
Times Film Corp. v. Chicago, 365 U.S. 43 (1961)
Manual Enterprises v. Day, 370 U.S. 478 (1962)
Bantam Books v. Sullivan, 372 U.S. 58 (1963)
Jacobellis v. Ohio, 378 U.S. 184 (1964)
A Quantity of Books v. Kansas, 378 U.S. 205 (1964)
Memoirs v. Massachusetts, 383 U.S. 463 (1966)
Redrup v. New York, 386 U.S. 767 (1967)
Austin v. Kentucky, 386 U.S. 767 (1967)
Gent v. Arkansas, 386 U.S. 767 (1967)
Jacobs v. New York, 388 U.S. 431 (1967)
Tannenbaum v. New York, 388 U.S. 439 (1967)
Keney v. New York, 388 U.S. 440 (1967)
Friedman v. New York, 388 U.S. 441 (1967)
Ratner v. California, 388 U.S. 442 (1967)
Cobert v. New York, 388 U.S. 443 (1967)
Sheperd v. New York, 388 U.S. 444 (1967)
Avansino v. New York, 388 U.S. 446 (1967)
Aday v. United States, 388 U.S. 447 (1967)
Corinth Publications v. Wesberry, 388 U.S. 448 (1967)
Books v. United States, 388 U.S. 449 (1967)
Rosenbloom v. Virginia, 388 U.S. 450 (1967)
A Quantity of Books v. Kansas, 388 U.S. 452 (1967)
Mazes v. Ohio, 388 U.S. 453 (1967)
Schackman v. California, 388 U.S. 454 (1967)
Ginsburg v. New York, 390 U.S. 629 (1968)
Interstate Circuit v. Dallas, 390 U.S. 676 (1968)
United Artists v. Dallas, 390 U.S. 676 (1968)
Rabeck v. New York, 391 U.S. 462 (1968)
Lee Art Theater v. Virginia, 392 U.S. 636 (1968)
Perez v. Ledesma, 401 U.S. 82 (1971)
Dyson v. Stein, 401 U.S. 200 (1971)
Bryne v. Karalexis, 401 U.S. 216 (1971)
United States v. Reidel, 402 U.S. 351 (1971)
United States v. Thirty-Seven Photographs, 402 U.S. 363 (1971)

FOOTNOTES

[1]Alexander Meiklejohn, "The First Amendment is An Absolute," in Philip B. Kurland, ed., Supreme Court Review (Chicago: University of Chicago Press, 1961), p. 245. See Justice Black's disagreement with Meiklejohn's thesis in Hugo LaFayette Black, A Constitutional Faith (New York: Knopf, 1968), pp. 45-48.

[2]William E. Francois, Mass Media Law and Regulation, 2nd ed. (Columbus, Ohio: Grid, 1978), p. 23.

[3]Professor Kalven suggested such a study in Harry Kalven, Jr., "Upon Rereading Mr. Justice Black on the First Amendment," UCLA Law Review 14 (January, 1967): 435.

[4]Dennis v. United States, 341 U.S. 494 (1951); Marc A. Franklin, The First Amendment and the Fourth Estate; Communications Law for Undergraduates (Mineola, N.Y.: Foundation Press, 1977), p. 88. On the same subject, see Samuel Krislov, The Supreme Court in the Political Process (New York: Macmillan, 1968), p. 117.

[5]Don R. Pember, Mass Media Law (Dubuque, Iowa: Wm. C. Brown, 1977), pp. 22, 52.

[6]Robert H. Birkby, "Supreme Court Libertarians and the First Amendment; An Analysis of Voting and Opinion Agreement, 1956-1964," Southwestern Social Science Quarterly 48 (March, 1968): 590-594.

[7]Edmond N. Cahn, "Justice Black and First Amendment 'Absolutes': A Public Interview," New York University Law Review 37 (1962): 548; Black, "The Bill of Rights and the Federal Government," and Douglas, "The Bill of Rights is Not Enough," in Edmond N. Cahn, The Great Rights (New York: Macmillan, 1963), pp. 41-158.

[8]A sampling of such opinions can be found in Roth v. United States, 354 U.S. 476, 508 (1957); Uphaus v. Wyman, 360 U.S. 72, 82 (1959); Barenblatt v. United States, 360 U.S. 109, 144-145 (1959); Kingsley International Pictures Corp. v. Regents, 360 U.S. 684, 697 (1959); Wilkinson v. United States, 365 U.S. 399, 415, 423 (1961); Braden v. United States, 365 U.S. 431, 438, 446 (1961); New York

Times v. Sullivan, 376 U.S. 254, 293 (1964); Jacobellis v. Ohio, 378 U.S. 184, 196 (1964); Rosenblatt v. Baer, 383 U.S. 463, 476, 491 (1966); Ginzburg v. United States, 383 U.S. 463, 476, 491 (1966); Time v. Hill, 385 U.S. 374, 398, 401 (1967); Associated Press v. Walker, Curtis v. Butts, 388 U.S. 130, 170 (1967); Brandenburg v. Ohio, 395 U.S. 444, 449, 450 (1969).

[9]For example, see Talley v. California, 362 U.S. 60 (1960); Lamont v. Postmaster General, 381 U.S. 301 (1965); Mills v. Alabama, 384 U.S. 214 (1966). For strategic and philosophical reasons for these watered-down opinions, see Soloman Resnik, "Black, Douglas, and Absolutes: Some Perspectives on the Supreme Court," Journal of Urban Law 47 (1970): 765.

[10]New York Times v. United States, United States v. Washington Post, 403 U.S. 713 (1971).

[11]Id. at 717.

[12]Id. at 720.

[13]For example. see CBS v. Democratic National Committee, 412 U.S. 94, 148 (1973); Pittsburgh Press Co. v. Commission on Human Rights, 413 U.S. 376 (1973); Gertz v. Robert Welch, 418 U.S. 323, 355 (1974).

[14]Lyle Denniston, "Today's Godfathers," The Quill 64 (September, 1976): 33.

[15]Laurent B. Frantz, "The First Amendment in the Balance," Yale Law Journal 71 (1962): 424; Wallace Mendelson, "On the Meaning of the First Amendment," California Law Review 50 (1962): 840.

[16]Franklin, The First Amendment, p. 91.

[17]Thomas I. Emerson, The System of Freedom of Expression (New York: Vintage Books, 1970), p. 16.

[18]Id.

[19]See their strong disagreement in First Amendment interpretation of the establishment clause in Zorach v. Clausen, 343 U.S. 306, 315 (1952).

[20]Tinker v. Des Moines School District, 393 U.S. 503, 517 (1969). Also see Street v. New York, 394 U.S. 576, 609 (1969) and Cohen v. California, 403 U.S. 15, 27 (1971) for other "symbolic" speech dissents by Black.

[21]See Black's discussion of "direct" and "indirect" abridgement of free speech in Barenblatt v. United States, 360 U.S. 109, 134 (1959). Among the sit-in cases are Cox v. Louisiana, 379 U.S. 559, 583 (1965); Brown v. Louisiana, 383 U.S. 131 (1966); Hamm v. City of Rock Hill, 379 U.S. 306 (1964). Also see Black, Constitutional Faith, pp. 54-58.

[22]Adderly v. Florida, 385 U.S. 39, 55 (1966).

[23]Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, 391 U.S. 308, 327 (1968).

[24]Id. at 326.

[25]Griswold v. Connecticut, 381 U.S. 429, 507 (1965). Also see Donald M. Gillmor, "Black and the Problem of Privacy," in Everette E. Dennis, Donald M. Gillmor, and David L. Grey, eds., Justice Hugo Black and the First Amendment (Ames: Iowa State Press, 1978), pp. 81-93.

[26]There is some disagreement over whether there is a difference between "freedom of speech" and "freedom of the press." For purposes of this study the distinction will be made. Reasons are given below. See Potter Stewart, "Or of the Press," Hastings Law Journal 26 (January, 1975): 631; First National Bank of Boston v. Bellotti, 98 S. Ct. 1407, 1426 (1978), Burger concurring; Melville Nimmer, "Is Freedom of the Press a Redundancy: What Does it Add to Freedom of Speech?" Hastings Law Journal 26 (January, 1975): 639; David Lange, "The Speech and Press Clauses," UCLA Law Review 77 (October, 1975): 77; Melville Nimmer, "Speech and Press: A Brief Reply," UCLA Law Review 23 (October, 1975): 120.

[27]But consider "public law" and "private law" of libel and privacy. Donald M. Gillmor and Jerome A. Barron, Mass Communication Law; Cases and Comment, 2nd ed. (St. Paul: West, 1974), pp. 180-324. Also consider the "business side" of the press as unprotected in International News Service v. Associated Press, 248 U.S. 215 (1918) and Associated Press v. United States, 326 U.S. 1 (1945).

[28]A study devoted to their voting and opinion-writing agreement, which needs updating, is Harold J. Spaeth, "An Approach to the Study of Attitudinal Differences as an Aspect of Judicial Behavior," Midwest Journal of Political Science 5 (February, 1961): 165. A parallel but broader work is Tinsley E. Yarbrough, "Justices Black and Douglas: The Judicial Function and the Scope of Constitutional Liberties," 1973 (June, 1973): 441-486. Their agreement

with each other and with each other and with other justices on the Court was studied extensively in articles and books discussed below.

[29]This hypothesis was most succinctly stated by Glendon Schubert, The Judicial Mind Revisited; Psychometric Analysis of Supreme Court Ideology (New York: Oxford University Press, 1974), p. 179.

[30]The data were first compiled by Glendon Schubert for his studies, The Judicial Mind; The Attitudes and Ideologies of Supreme Court Justices, 1946-1963 (Evanston, Ill.: Northwestern University Press, 1965) and Judicial Mind Revisited. The data are available through the Institute for Social Research, Center for Political Studies, Ann Arbor, Michigan. See its Guide to Resources and Services, p. 172 and accompanying John Paul Ryan and C. Neal Tate, The Supreme Court in American Politics: Policy Through Law (Washington, D.C.: American Political Science Association, 1975).

[31]Krislov, Political Process, p. 117.

[32]See Black's dissent in American Communications Association v. Douds, 339 U.S. 382, 445 (1950).

[33]See n. 30.

[34]Similar criteria were used in the author's master's thesis, "A Study of the Relationship Between the Ideological Tendencies of United States Supreme Court Justices and Their Voting Behavior in Selected Cases Affecting the Press, 1946-1974," (M.S. Thesis, South Dakota State University, 1977), pp. 25-26.

[35]Id.

[36]J. P. Guilford and Benjamin Fruchter, Fundamental Statistics in Psychology and Education, 5th ed. (New York: McGraw-Hill, 1973), p. 311; J. W. Holly and J. P. Guilford, "A Note on the G Index of Agreement," Educational and Psychology Measurement 24 (1964): 749.

[37]Sheldon Goldman and Thomas P. Jahnige, The Federal Courts as a Political System, 2nd ed. (New York: Harper & Row, 1976), pp. 160-165; Schubert, Judicial Mind Revisited, p. 8.

[38]The APSA package provides a number of different time segments as variables. See Ryan, The Supreme Court, app. A, pp. 77-81.

[39]The rankings, of course, are relative to the courts under study. There were 24 justices in the total sample, 11 in the Vinson Court, 12 in the Early Warren Court, 11 in the Middle Warren Court, 10 in the Late Warren Court and 11 in the Burger Court.

[40]Donaldson v. Read Magazine, 333 U.S. 178 (1948); Barr v. Matteo, 360 U.S. 564 (1959); Estes v. Texas, 381 U.S. 532 (1965); Sheppard v. Maxwell, 384 U.S. 333 (1966); Perez v. Ledesma, 401 U.S. 82 (1971); and Dyson v. Stein, 401 U.S. 200 (1971).

[41]Donaldson v. Read Magazine, 333 U.S. 178, 191-192 (1948).

[42]Id. at 195.

[43]S. Sidney Ulmer, "The Analysis of Behavior Patterns on the United States Supreme Court," Journal of Politics 22 (1960): 429.

[44]Barr v. Matteo, 360 U.S. 564, 575 (1959).

[45]Id. at 577.

[46]Id. at 584.

[47]Id. at 584-585.

[48]Id. at 585.

[49]Estes v. Texas, 381 U.S. 532, 541-542 (1965).

[50]Id. at 583.

[51]Id. at 585.

[52]Id. at 604.

[53]Id. at 614-615.

[54]Sheppard v. Maxwell, 384 U.S. 333, 350-351 (1966).

[55]Id. at 363. Black also dissented without comment in Marshall v. United States, 360 U.S. 310 (1959), a case involving jurors exposed to prejudicial publicity. The Court, however, did not address freedom of the press.

[56]In re Murchison, 349 U.S. 133, 136 (1955).

[57]Bridges v. California, 314 U.S. 232, 234 (1941).

[58]Craig v. Harney, 331 U.S. 367 (1947); William O. Douglas, "The Public Trial and the Free Press," Rocky Mountain Law Review 33 (1960-1961): 1.

[59]Perez v. Ledesma, 401 U.S. 82 (1971); Dyson v. Stein, 401 U.S. 200 (1971).

[60]Younger v. Harris, 401 U.S. 37 (1971).

[61]Perez v. Ledesma, 401 U.S. 82, 84 (1971).

[62]Id.

[63]Id. at 83.

[64]Dyson v. Stein, 401 U.S. 200, 201 (1971).

[65]Younger v. Harris, 401 U.S. 37, 59 (1971).

[66]Dyson v. Stein, 401 U.S. 200, 204 (1971).

[67]Id. at 206.

[68]Id. at 207.

[69]Id.

[70]Id. at 208.

[71]Id. at 209.

[72]Roth v. United States, 354 U.S. 476, 514 (1957).

[73]Dyson v. Stein, 401 U.S. 200, 212 (1971).

[74]Monitor Patriot Co. v. Roy, 401 U.S. 265, 277 (1971); Time v. Pape, 401, U.S. 279, 292 (1971); Ocala Star-Banner Co. v. Damron, 401 U.S. 295, 301 (1971). Also see New York Times v. United States, 403 U.S. 713 (1971).

[75]John P. Frank, "Hugo L. Black," in Leon Friedman and Fred L. Israel, eds., The Justices of the United Supreme Court 1789-1969; Their Lives and Major Opinions, 4 vols. (New York: Chelsea House, 1969), 3:2321-2370; Frank, "William O. Douglas," 4:2447-2490.

[76]Hugo Black, Jr., My Father: A Remembrance (New York: Random House, 1975), pp. 239-240.

[77]William O. Douglas, "Mr. Justice Black: A Foreward," Yale Law Journal 65 (February, 1956): 449.

[78]C. Herman Pritchett, The Roosevelt Court: A Study in Judicial Politics and Values, 1937-1947 (New York: Macmillian, 1948).

[79]Schubert, Judicial Mind, p. 113.

[80]Id. at 117.

[81]Id. at 129, 139-140.

[82]Id. at 150, 153, 226.

[83]Spaeth, "Judicial Behavior," pp. 177-180. Also see Joseph Tannenhaus, "Supreme Court Attitudes Toward Federal Administrative Agencies, 1947-1956--An Application of Social Science Methods to the Study of the Judicial Process," Vanderbilt Law Review 14 (March, 1961): 493-494.

[84]Glendon Schubert, Quantitative Analysis of Judicial Behavior (Glencoe, Ill: Free Press, 1959), pp. 124-127; Spaeth, "Judicial Behavior," pp. 170-172; Birkby, "Supreme Court Libertarians," pp. 590-594.

[85]Schubert, Judicial Mind Revisited, p. 131.

[86]Glendon Schubert, Judicial Policy Making; The Political Role of the Courts, rev. ed. (Glenview, Ill.: Scott, Foresman, 1974), p. 179.

[87]Id. at 198.

[88]Stephen L. Wasby, The Supreme Court in the Federal Judicial System (New York: Holt, Rinehart & Winston, 1978), pp. 170-174; Tinsley E. Yarbrough, "Justice Black, the First Amendment, and the Burger Court," Mississippi Law Journal 46 (Spring, 1975): 203.

[89]Schubert, Judicial Mind Revisited, p. 85.

[90]Douglas, "Mr. Justice Black," p. 450.

[91]Dyson v. Stein, 401 U.S. 200, 204 (1970).

[92]Black, Constitutional Faith, pp. xv-xvii.

[93]Schubert, Judicial Mind Revisited, p. 144; Glendon Schubert, The Constitutional Policy (Boston: Boston University Press, 1970), pp. 65-69, 120.

[94]S. Sidney Ulmer, "The Longitudinal Behavior of Hugo Lafayette Black: Parabolic Support for Civil Liberties, 1937-1971," Florida State University Law Review 1 (Winter, 1973): 132-153.

[95]See A. E. Dick Howard, "Mr. Justice Black: The Negro Movement and the Rule of Law," Virginia Law Review 53 (June, 1967): 1054; Patrick McBride, "Mr. Justice Black and His Qualified Absolutes," Loyola University Law Review (April, 1969): 37; Raymond G. Decker, "Justice Hugo L. Black: The Balancer of Absolutes," California Law Review 59 (November, 1971): 1335; Yarbrough, "Justices Black and Douglas," pp. 484-485.

[96]Kalven, "Upon Rereading," p. 448.

[97]Wallace Mendelson, Black and Frankfurter: Conflict in the Court, 2nd ed. (Chicago: University of Chicago Press, 1966), p. 121.

[98]Wallace Mendelson, "Hugo L. Black and Judicial Discretion," Political Science Quarterly 85 (March, 1978): 17-39.

[99]Black, Constitutional Faith, pp. 44-45.

[100]John M. Harlan, "Mr. Justice Black: Remarks of a Colleague," Harvard Law Review 81 (November, 1967): 1.

[101]Id. at 2.

[102]Archibald Cox, "Constitutional Adjudication and the Promotion of Human Rights," Harvard Law Review (November, 1966): 95; Martin Shapiro, Freedom of Speech: The Supreme Court and Judicial Review (Englewood Cliffs, N.J.: Prentice Hall, 1966), pp. 149-190; Samual Krislov, The Supreme Court and Political Freedom (New York: Free Press, 1968), p. 105; Black, My Father, pp. 243-245; Charles E. Rice, "Justice Black, the Demonstrators, and a Constitutional Rule of Law," The Vision and the Dream of Justice Hugo L. Black; An Examination of a Judicial Philosophy (University, Ala.: University of Alabama Press, 1975); Everette E. Dennis, Neil A. Lavich, and J. Edward Gerald, "Expression and Conduct in the Opinions of Justice Black," in Dennis, Justice Hugo Black, pp. 160-170; Yarbrough, "Justices Black and Douglas," pp. 484-485.

[103]Krislov, Political Process, p. 117.

[104]Black, My Father, pp. 243-245.

[105]Mendelson, "Black and the Judicial Discretion," pp. 25-27.

[106]Wallace Mendelson, "Mr. Justice Douglas and Government by the Judiciary," Journal of Politics 38 (November, 1976): 920.

[107]Id. at 937. Also see H. Frank Way, "The Study of Judicial Attitudes: The Case of Mr. Justice Douglas," Western Political Quarterly 24 (March, 1971): 22; Marian D. Irish, "Mr. Justice Douglas and Judicial Restraint," University of Florida Law Review 6 (1953): 552. Vern Countryman, The Judicial Record of William O. Douglas (Cambridge: Harvard University Press, 1974), pp. 379-380; David W. Rohde and Harold J. Spaeth, Supreme Court Decision Making (San Francisco: W. H. Freeman, 1976), p. 48; Vern Countryman, "Justice Douglas and Freedom of Expression," University of Illinois Law Forum 1978 (1978): 302; L. A. Powe, Jr., "Evolution to Absolutism; Justice Douglas and the First Amendment," Columbia Law Review 74 (April, 1974): 406-407; Thomas I. Emerson, "Justice Douglas' Contribution to the Law; The First Amendment," Columbia Law Review 74 (April, 1974): 354, 356.

[108]Dennis v. United States, 341 U.S. 494, 517 (1951).

[109]Mendelson, Black and Frankfurter.

[110]Shapiro, Free Speech; Krislov, Political Freedom and Political Process; C. Herman Pritchett, Civil Liberties and the Vinson Court (Chicago: University of Chicago Press, 1966).

[111]Shapiro, Free Speech, pp. 87, 95.

[112]Rice, "Constitutional Rule of Law," pp. 463-466; Yarbrough, "Justices Black and Douglas," pp. 484-486.

[113]Shapiro, Free Speech, p. 110.

[114]Mendelson, "Black and Judicial Discretion," p. 24.

TABLE 1

A. BLACK-DOUGLAS INTERAGREEMENT IN ALL NONUNANIMOUS CASES, 1946-74.

		BLACK	
		CONSERVATIVE Votes (%)	LIBERAL Votes (%)	
DOUGLAS	CONSERVATIVE Votes (%)	57 (3.3)	142 (8.3)	199 (11.6)
	LIBERAL Votes (%)	319 (18.7)	1191 (69.7)	1510 (88.3)
G = .460		376 (22.0)	1333 (78.0)	1709 (100.0)

B. BLACK-DOUGLAS INTERAGREEMENT IN NONUNANIMOUS CIVIL LIBERTIES CASES, 1946-1974

		BLACK	
		CONSERVATIVE Votes (%)	LIBERAL Votes (%)	
DOUGLAS	CONSERVATIVE Votes (%)	22 (2.2)	245 (24.3)	267 (26.4)
	LIBERAL Votes (%)	47 (4.7)	696 (69.0)	743 (73.6)
G = .420		69 (7.8)	941 (92.2)	1010 (100.0)

TABLE 1 (CONTINUED)

C. BLACK-DOUGLAS INTERAGREEMENT IN NONUNANIMOUS PRESS FREEDOM CASES, 1946-1974.

		BLACK	
	UNFAVORABLE Votes (%)	FAVORABLE Votes (%)	
UNFAVORABLE Votes (%)	5 (6.9)	3 (4.2)	8 (11.1)
DOUGLAS			
FAVORABLE Votes (%)	3 (4.2)	61 (84.7)	64 (88.9)
G = .833	8 (11.1)	64 (88.9)	72 (100.0)

TABLE 2

BLACK-DOUGLAS G INDEXES OF INTERAGREEMENT, ALL CASES AND CIVIL LIBERTIES CASES, PER COURT, 1946-1974

	ALL CASES	CIVIL LIBERTIES CASES
VINSON COURT	.478	.479
EARLY WARREN COURT	.825	.825
MIDDLE WARREN COURT	.600	.655
LATE WARREN COURT	.070	.000
BURGER COURT	.000	.000

TABLE 3

BLACK-DOUGLAS PRESS FREEDOM INTERAGREEMENT, PER COURT, 1946-1974

	AGREEMENT (%)	DISAGREEMENT (%)	G INDEX
VINSON COURT	8 (89%)	1 (11%)	.777
EARLY WARREN COURT	8 (100%)	0 (0%)	1.000
MIDDLE WARREN COURT	14 (88%)	2 (12%)	.750
LATE WARREN COURT	30 (97%)	1 (3%)	.936
BURGER COURT	6 (75%)	2 (25%)	.500
TOTAL	66 (92%)	6 (8%)	.833

TABLE 4

A. BLACK-DOUGLAS PERCENTAGES AND RANKINGS OF LIBERALISM IN ALL CASES, 1946-1974

	BLACK		DOUGLAS	
	RANK	PCT.	RANK	PCT.
VINSON COURT	3	87	4	79
EARLY WARREN COURT	1.5	94	1.5	94
MIDDLE WARREN COURT	2	86	1	89
LATE WARREN COURT	6	54	1	91
BURGER COURT	4.5	48	1	96
TOTAL	9	78	3	89

TABLE 4 (CONTINUED)

B. BLACK-DOUGLAS PERCENTAGES AND RANKINGS OF LIBERALISM IN CIVIL LIBERTIES CASES, 1946-1974.

	BLACK		DOUGLAS	
	RANK	PCT.	RANK	PCT.
VINSON COURT	2	82	4	77
EARLY WARREN COURT	2	93	1	98
MIDDLE WARREN COURT	4	85	1	97
LATE WARREN COURT	6	50	1	97
BURGER COURT	4.5	48	1	96
TOTAL	9	73	2	94

C. BLACK-DOUGLAS PERCENTAGES AND RANKINGS OF FAVORABLENESS IN PRESS FREEDOM CASES, 1946-1974.

	BLACK		DOUGLAS	
	RANK	PCT.	RANK	PCT.
VINSON COURT	6	56	1	67
EARLY WARREN COURT	1.5	100	1.5	100
MIDDLE WARREN COURT	1	83	4	72
LATE WARREN COURT	4	67	1	100
BURGER COURT	4	67	1	100
TOTAL	2	86	1	89